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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1041

MICHAEL DUBINA,

Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.

JAMES B. STANLEY,
Counsel for Petitioner.

HARRY C. HOWARD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1041

MICHAEL DUBINA,
Petitioner and Appellant Below,

vs.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Michael Dubina, respectfully prays for a writ of certiorari to review a judgment of the Supreme Court of the State of Michigan entered February 23, 1943.

Summary Statement of Matter Involved.

This case challenges the validity under the due process clause of the 14th amendment to the Federal Constitution of Act No. 259 of the Public Acts of Michigan of the regular 1939 session hereinafter referred to as the Act.

In the trial court petitioner was charged with the crime of murder (R. 1) and was acquitted by a jury who also found

him insane at the time of the alleged acts claimed to constitute murder (R. 19). Defendant's plea was temporary insanity (R. 4) brought on by the deceased and the killing occurred at the height of a homo-sexual panic (R. 4, 18). The day following the verdict the petitioner was committed for life under the act by the trial court (R. 22).

The federal questions involved here were reserved by appropriate motion before the trial court who overruled the same without opinion (R. 23-24) and were reserved by reasons and grounds of appeal and assignments of error before the Michigan Supreme Court (R. 13-16). The latter court ruled specifically on the claim that the Act was repugnant to the due process clause of the 14th amendment and upheld the validity of the Act as not being repugnant to the 14th amendment (R. 25-33).*

Petitioner remains confined today at Ionia Hospital in Michigan, an institution primarily used for transfer of insane inmates from other Michigan penal institutions and prisons. There were no factual questions involved in the appeal to the Michigan Supreme Court and none are involved here.

Jurisdiction.

Jurisdiction is invoked under Section 237 (b) of the Judicial Code as amended by Act of Feb. 13, 1925, Ch. 299; Sec. 1, 43 Stat.; Sec. 344 of Title 28 U. S. C. A. in that a judgment has been rendered by the highest court of the State of Michigan sustaining the validity of a Michigan Act claimed by petitioner to be repugnant to the due process clause of the 14th amendment to the Federal Constitution. Judgment entered by the Michigan Supreme Court on February 23, 1943 (R. 33) and this petition being made on date endorsed hereon and being mailed to the clerk of this Honor-

* In lieu of appending lengthy typed opinion same appears in printed form at reference.

able Court as of even date and to be filed within the three months period of limitation. Petitioner elects this method of review rather than by writ of error allowable under Sec. 237 (a) of the aforesaid Act or Act of Jan. 31, 1928, Chap. 14, 45 Stat. 54. Petitioner's method was followed in *Skinner* v. *Oklahoma,* 316 U. S. 535 in reviewing a State Act upheld by the State court.

Statute Involved.

The legislative Act claimed by petitioner to be repugnant to the 14th amendment is Act No. 259 of the Michigan Public Acts of 1939 which may be found on pages 476 and 477 of the officially reported Acts and also in the Michigan Supreme Court opinion (R. 25). Said Act verbatim is as follows:

Michigan Statutes Anno, 28.933 (1)

"Sec. 15a. Whenever any person charged with murder under the laws of this state, has been bound over to the court having jurisdiction of such criminal case, and the return is filed with the clerk of such court, the clerk shall forthwith notify the state hospital commission of that fact and such commission as soon as possible thereafter, shall cause such person to be examined for the purpose of determining his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. The commission shall designate 3 psychiatrists, as herein defined, for the purpose of making such examination. The report of such psychiatrists shall be transmitted by the commission to the clerk of said court and shall be accessible to the court, the probation officer thereof, the attorney general, prosecuting attorney and the attorney for such person. For making such examination each psychiatrist shall receive mileage at the rate of 10 cents per mile, and each psychiatrist who is not in the employ of the state shall also receive such fee as the trial court shall determine.

28.933 (2)

Sec. 15b. Any clerk of a court, or deputy clerk, who wilfully neglects to perform any duty imposed upon him by the preceding section shall be guilty of a misdemeanor and subject to imprisonment for not to exceed 90 days and a fine of not to exceed $100.00 or both such fine and imprisonment in the discretion of the court.

28.933 (3)

Sec. 15c. Any person, who is tried for the crime of murder and is acquitted by the court or jury by reason of insanity, shall forthwith be committed by order of said court to a state hospital for the criminally insane for the remainder of his natural life. The Governor may, however, discharge such person upon recommendation of the commission, based upon an investigation by it and its determination that such discharge will not be harmful to other persons or their property.

28.933 (4)

Sec. 15d. A psychiatrist under the meaning of the foregoing sections is a physician, duly licensed to practice in the state of Michigan, who has had at least 5 years' experience in actual practice, including either (a) 3 years' full time practice since January 1, 1935, in the care and treatment of persons suffering from nervous or mental disease or mental defect, in an institution provided for the care of such persons, or (b) has devoted 5 years prior to the case in which his services are requested, to a practice confined wholly or substantially to the diagnosis, care or treatment of persons suffering from nervous and mental disease or mental defect."

Questions Presented.

Does the final judgment of the Michigan Supreme Court sustaining the validity of the Act deprive petitioner of due process of law in that there was no hearing provided for or had prior to his committment in an institution for life?

May the State under the guise of a criminal verdict of "Not Guilty" summarily take the liberty of a defendant and hold him confined until he establishes sanity, with burden of proof upon him, without violating the due process clause?

Reasons Relied On for Allowance of Writ.

The Michigan Supreme Court erred in holding that petitioner may be deprived of his liberty summarily and permanently without first allowing him an opportunity to be heard before some judicial tribunal on the reasons for the proposed incarceration.

The Michigan Supreme Court erred in holding that a legislative Act of the state providing for no hearing before permanent commitment was not repugnant to the due process clause of the 14th amendment.

The Michigan Supreme Court erred in holding that a right of habeas corpus with burden of proof upon petitioner to establish sanity at subsequent periods after summary commitment fulfilled the due process requirement in the original instance.

This precise question has not heretofore been decided by this Honorable Court. But this Court has rendered similar and applicable decisions not in accord with the Michigan Supreme Court opinion in this case. These decisions were not mentioned in the Michigan opinion. They sustain the proposition that the essential elements of due process are notice and an opportunity to be heard and to defend in an orderly proceedings before a tribunal having jurisdiction and are as follows:

Baldwin v. *Hale,* 1 Wall. 223;
Ray v. *Norseworth,* 23 Wall. 128;
Riverside Mills v. *Menefee,* 237 U. S. 189;
Orchard v. *Alexander,* 157 U. S. 372;
Simon v. *Craft,* 182 U. S. 427;
Twining v. *New Jersey,* 211 U. S. 78;

Ballard v. *Hunter*, 204 U. S. 241;
Scott v. *McNeal*, 154 U. S. 34;
Taylor's Due Process of Law, page 286.

Certainly these decisions were worthy of comment by the Michigan Court and had the court believed them to be distinguishable this fact ordinarily would be mentioned. The foregoing statement that the precise questions had not previously been decided goes only to an insertion in the question involved which is incidental, of no consequence and in no way leads to a distinguishing of the principle involved in the cited cases. This new matter resolves itself around the fact that prior to commitment there was a criminal prosecution in which a defense of temporary insanity was raised and a verdict determining the collateral issue of lack of intent was rendered simultaneously with that of "Not Guilty". On the trial of the case the question of lack of intent or temporary insanity was disputed by the State (R. 17-18) and the report of the psychiatrists appointed by the state Hospital Commission prior to trial was to the effect that petitioner was sane (R. 2-3).

A highly important and substantial question is involved. Probably no greater fundamental right exists, (if it can be said that constitutional rights are comparative) than the due process clause in so far as it relates to some kind of opportunity to be heard before a person is restrained permanently of his liberty.

In New York, California and Washington the state courts have upheld similar statutes on a theory that right to be released after confinement on showing of sanity is a good substitute for a hearing before commitment and therefore due process is met. If this is the test of due process then it could apply with equal force to any confinement for any

reason providing the prisoner has a right at some subsequent period to show that the reasons for such confinement are not justified. Such is obviously not a true statement of the fundamental constitutional guaranty and it was never intended that it should be construed by such illogical legal gymnastics. Where personal liberty is concerned and involved there can be only one definition of due process so adequately expressed by Daniel Webster in the Dartmouth College case as being "a law which hears before it condemns; which proceeds upon inquiry; and renders judgment only after trial", a phrase often repeated and adopted by this and many Courts of the land.

Dartmouth College v. *Woodward,* 4 Wheat. (U. S.) 518.

Much more logical are the dissenting opinions in some of the state cases and in two federal cases. The Washington state act was held unconstitutional in the lower federal courts because no hearing was allowed before commitment and therefore was repugnant to the 14th amendment. *Brown* v. *Urquhart,* 139 Federal 846. In this case petition for habeas corpus was filed with the federal district court (Circuit then) before petitioner had exhausted his state remedies. On appeal, *Urquhart* v. *Brown,* 205 U. S. 179, 27 Sup. Ct. 459 this Honorable Court adopted its rule that a person must first exhaust all of his remedies in the state courts and apply for further review to this court before a federal district court has jurisdiction to entertain a hearing on habeas corpus provided for in Secs. 451, 452 and 453 of Title 28 U. S. C. A.; R. S. Secs. 751, 752 and 753, Feb. 13, 1925. And this Honorable Court specifically refused to decide the merits of the constitutional question as relating to the 14th amendment, saying, "Without expressing opinion as to the constitutionality of the statute." Pg. 460 of Sup. Ct. citation.

An identical federal statute was held unconstitutional in *Barry* v. *Hall,* 98 F. (2d) 222 by the United States Court of Appeals for the District of Columbia.

In view of these divergent opinions, the grave question involving personal liberty, the apparent danger of dispensing with the fundamental guaranty of hearing before permanent commitment and the fact that arbitrary institutional authorities could prevent release of an individual during his entire life on the slightest and most flimsy testimony on a subsequent hearing testing sanity in which the onus of proving sanity would be on petitioner and practically leaving the liberty of the petitioner to depend upon the uncontrolled pleasure of the hospital commission thus creating a most dangerous scheme entirely opposed to the constitutional provisions securing to every one the protection of due process of law, it is respectfully submitted that this Honorable Court should decide this question in finality. Since the statute is a harsh one it would be well for legislative bodies, state courts and the profession of the bar and the public to know to what extremes may a law go in dispensing with hearings before a permanent and final commitment of an individual. The Michigan Supreme Court ruling is clearly erroneous and not in accord with the principles of applicable decisions of this court and is directly contrary to *Barry* v. *Hall, supra* and *Brown* v. *Urquhart,* Fed. Dist. *supra.*

WHEREFORE, your petitioner respectfully prays: (1) that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Michigan commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; (2) that the judgment of the Supreme Court of Michigan may be reviewed and re-

versed by this Honorable Court, and (3) that your petitioner have such further relief in the premises as to this Honorable Court may seem meet and just.

JAMES B. STANLEY,
Attorney for Petitioner,
610 Kal. Nat. Bank Bldg.,
Kalamazoo, Michigan.

HARRY C. HOWARD,
Of Counsel.

Dated May 18, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1041

MICHAEL DUBINA,

Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Opinion.

The opinion of the Michigan Supreme Court shown at pages (R. 25-33) is reported at 304 Michigan Supreme Court Rep. 363; 8 N. Western (2nd) 99.

Jurisdiction.

A statement of the grounds on which the jurisdiction of this Court is invoked is contained in the foregoing petition and for the sake of brevity reference is made to same as if fully incorporated herein.

Statement of the Case.

Statement of the case and the questions presented are contained in the foregoing petition and for the sake of brevity reference is made to same as if fully set forth here.

Specification of Errors.

In brief form the Michigan Supreme Court erred in holding valid a legislative act of the state of Michigan providing for a summary permanent commitment of petitioner following an acquittal on the grounds of insanity in a criminal case without a hearing prior to the commitment in violation of the due process clause of the 14th Amendment. Further specific specifications appear in the petition and are not repeated for sake of brevity.

ARGUMENT.

1. Due process requires hearing on any issue before permanent confinement of an individual.

The right of a State to provide for incarceration of an insane person is not questioned. The right of a State to restrain a person temporarily and pending a hearing is not questioned. But any commitment whether on grounds of insanity or under any pretense should be preceded with some kind of inquest and notice to the one to be detained and there should be an opportunity to defend. The fact that one has been acquitted of a criminal charge and a jury arrived at such acquittal because they believed him temporarily insane brought about by malicious acts of the deceased and at the height of a homo-sexual panic on one occasion cannot possibly dispense with our fundamental law that every person has a right to his day in court before his liberty is taken from him permanently. An acquittal by a jury of ones' peers has always meant only one thing in our system

of jurisprudence and that is the release of the person charged with crime with all of the privileges of a free man.

Due process is not limited to criminal cases. To do so would be to take one's liberty away under the guise of a civil proceeding by the use of artificial phraseology. The 14th amendment had no such intention.

> "Due process implies at least a conformity with natural and inherent principles of justice and forbids—that no one shall be condemned in his person or property without an opportunity of being heard in his own defense." Holden *v.* Hardy, 18 Sup. Ct. 383; Postal Telegraph *v.* City of Newport, 38 Sup. Ct. 566.
>
> "Due process of law requires that every man shall have the protection of his day in court and the benefit of the general law which hears before it condemns and proceeds not arbitrarily but upon inquiry and renders judgment only after trial." Truax *v.* Corrigan, 42 Sup. Ct. 124.

This Court recently said in *Skinner* v. *Oklahoma*, 316 U. S. 535 on page 545,

> "A law which condemns without hearing all the individuals of a class to so harsh a measure as the present (sterilization after so many convictions) because some or even many merit condemnation is lacking in the first principle of due process * * * While the state may protect itself from the inheritable tendencies of the individual which are injurious to society, the most elementary notions of due process would seem to require it to take appropriate steps to safeguard the liberty of the individual by affording him before he is condemned * * * some opportunity to show that he is without such inheritable tendencies."

The dissenting opinion of Justice Gaynor in *People ex Rel. Peabody* v. *Chandler*, 25 L. R. A. ns. 946; 196 N. Y. 525 is more in reason with decisions of this Court than the pre-

vailing opinion upholding the New York law reading practically the same as the Michigan statute when he says,

> "It is not disputed that alleged lunatics may be temporarily committed without a hearing until the case can be heard in conformity with the requirement of due process of law; but they may not be committed permanently any more than alleged criminals without a hearing of a judicial nature. Citing Re: Boyett, 136 N. C. 415; 67 L. R. A. 972; Re: Lambert, 134 Cal. 626, 55 L. R. A. 856, 66 Pac., 851; State ex Rel. Blaisdell *v.* Billings, 55 Minn. 467, 57 N. W. 206 and 794; Portland *v.* Bangor, 65 Me. 120; Chase *v.* Hathaway, 14 Mass. 222; Ordway *v.* St. Saviours Sanitarium, 34 App. Div. N. Y. 363".

The language of Justice Stephens in *Barry* v. *Hall*, 98 F. (2d) 222 is particularly illuminating and is ground for belief that federal courts and this Honorable Court would not accept the Michigan and other state decisions upholding this kind of an Act. Petitioner relies heavily on this decision. So adaptable is the language quoted by the learned Justice from a Kansas decision at pg. 226 that we cannot help but repeat the same here,

> "Independently of statutes, every person is entitled to his day in court, and to the right to be heard before he is condemned. No mere ex parte proceeding can effect either personal or property rights. Were the legislature to attempt to enact a law authorizing judicial proceedings, the object of which was to effect the person or property of a citizen, without notice or opportunity to be heard, such legislation would be rejected and repudiated in advance as an intolerable outrage upon the rights of citizens. It would not only be a serious infringement of natural rights but would be a flagrant violation of the constitutional guaranty that no person shall be deprived of his liberty or property without due process of law.

"Notice and opportunity to be heard lie at the foundation of all judicial procedure. There are fundamental principles of justice which cannot be ignored. Without them no citizen would be safe from the machinations of secret tribunals, and the most sane member of the community might be adjudged insane and landed in a madhouse. It will not do to say that it is useless to serve notice upon an insane person; that it would avail nothing because of his inability to take advantage of it. His sanity is the very thing to be tried. At the threshold of the inquiry the court is supposed to have no knowledge of the mental condition, but the presumption of the law is in favor of sanity. Insanity, like crime, does not exist in law until it is established by evidence in a proper proceeding. A trial without notice—a mere ex parte proceeding—has no proper place in a court of justice. It is a nullity, and void as affecting those not parties to it."

The federal statute involved in *Barry* v. *Hall, supra* is practically identical to the Michigan Act in that the United States Treasury Department was given authority to transfer Public Health employees and others confined in the Marine hospital to a mental institution upon having some evidence in their possession that the employees had gone insane. Likewise the statute allowed a right of habeas corpus subsequent to commitment in the mental institution for the purpose of then testing sanity. Justice Stephens also specifically repudiates the state cases allowing these subsequent hearings and dispensing with hearings before commitment. After citing several state cases the Justice says on page 228,

"The statutes involved in these cases were lunacy statutes. They did not require notice and opportunity to be heard in advance of commitment and confinement, but did afford a hearing later at the instance of the subject, in the Dowdell Case by special statutory

proceeding, and in the other cases by the writ of habeas corpus. The provisions for ultimate hearing were held to save the statutes. We think the cases are wrongly decided."

State courts are more likely to uphold the constitutionality of a law of their own state claimed to be repugnant to the Federal Constitution than will the federal courts and this Honorable Court. It is the general statement of text writers and compilers that notwithstanding the ability and integrity of the State Tribunals such is the frailty of our nature that, without being aware of it, their judgments have been influenced to maintain the legislation of their respective states, and in almost every instance in which this Court has held a state law to be unconstitutional the same law was held valid by the unanimous decision of the state judiciary.

While the rule in this Court is that there is a reasonable presumption in favor of an Act the same is rebuttable.

Home Telegraph v. *Los Angeles*, 211 U. S. 265;
Sweet v. *Rechel*, 159 U. S. 380;
Sinking Fund Cases, 99 U. S. 700;
Borden v. *Baldwin*, 293 U. S. 194.

State courts follow almost literally a rule that the Act will be valid unless it is so noxious as to be shocking and revolting to the conscience. One rule adopted by the Michigan court appears in the opinion (R. 28). Therefore it is logical to assume that the court adopted the theory that since a hearing was provided somewhere along the way the due process requirement of a hearing had probably been met or at least was debatable. But as was said in *Skinner* v. *Oklahoma, supra.*

"There are limits to the extent to which the presumption of constitutionality can be pressed, especially

> where the liberty of the person is concerned and where the presumption is resorted to only to dispense with a procedure which the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action."

To say that by dint of some relief which may be secured in years to come satisfies due process is to miss the purpose of that safeguard with all due respect to judicial opinion which suggest the thing.

(2) The issue of insanity on a criminal charge is purely collateral.

The issue of insanity on the trial was only whether the petitioner was insane at the time of committing an offense and that is all that the verdict could establish. He was not in the situation of being tried at the same time on an issue of his present sanity before the judge and of his past sanity before the jury. The whole subject of temporary insanity was purely collateral. It could not be charged in the information by the state along with a charge of crime. It is elementary that the crime of murder must have intent; and that lack of intent is the gist of an insanity plea. In *Brown* v. *Urquhart,* 139 Fed. 846 the federal circuit court stresses this point in holding invalid as lacking in due process the Washington State Act which in substance is the same as the Michigan Act. The Court said in its opinion,

> "The verdict is a conclusive determination of the only question submitted to the jury, viz; whether defendant is guilty or not guilty of the crime charged; and being purged of criminality, the power of the court in which he was tried to imprison him depended entirely upon facts and conditions existing subsequent to the acquittal which necessarily could not have been comprehended in the verdict."

(3) Right to prove sanity after permanent confinement is no substitute for an original hearing.

To confine a person permanently without hearing is almost without precedent and has no precedent in this Honorable Court. Later relief on a writ of habeas corpus to test sanity may never be accorded. It is common knowledge that institutional authorities may be and often are capricious and arbitrary. The slightest off-color conduct of an individual when he is at their command every hour of the day and night over a period of years may be built from a mole hill to a mountain. What chance does the individual have with the onus upon him in a subsequent hearing under such circumstances. While due process vests no rights in a rule of law it is more than a rule which arbitrarily confines and places the burden of proof upon one to show he is not guilty. Cruel and unusual punishment could be easily argued under Article VIII if Congress had enacted such a statute. This changes our whole concept of law. It has been our rule that an accused person need not even take the witness stand, that it was up to the goverment or the state to prove him guilty or establish insanity if incarceration is desired. A defendant who enters a plea of temporary insanity is immediately confronted with confinement for life whether he is found guilty or not. Particularly pertinent is the language of this Court in *McFarland* v. *American Sugar Co.*, 241 U. S. 79, where it was said,

> "The legislature may go a good way in raising a presumption or in changing the burden of proof but there are limits * * * It is not within the province of the legislature to declare an individual guilty of crime."

With equal force the opinion might also have continued that the legislature cannot declare a person summarily disposed to life imprisonment upon entering a plea of tempo-

rary insanity in a criminal case. Where due process is involved it is immaterial whether confinement is tied in with crime. The principal thing is the incarceration and the deprivation of liberty.

It is submitted that the foregoing both in this brief and the petition involve a substantial question which ought to be reviewed by this Court. It is well established that review by this Court will not be denied for want of a substantial federal question unless the contentions of the appellant are clearly debatable and utterly lacking in merit. *Hamilton* v. *Regents of U. of California*, 293 U. S. 245, 258; 79 L. Ed. 343, 350.

Conclusion.

It is therefore respectfully submitted that the case is one calling for the exercise by this Court of its power to issue its writ of certiorari; that petitioner may not be deprived of the rights guaranteed him by the 14th amendment, and that to such end a writ of certiorari be granted directed to the Supreme Court of the State of Michigan and this Honorable Court review the decision aforesaid and finally reverse it.

JAMES B. STANLEY,
Attorney for Petitioner.

HARRY C. HOWARD,
Of Counsel.

Dated at Kalamazoo, Michigan, this 18th day of May, 1943.

STATE OF MICHIGAN,
County of Kalamazoo, ss:

James B. Stanley, being duly sworn, deposes and says that on the 18th day of May, 1943 he enclosed a true copy of the attached petition and brief and accompanying record

in an envelope addressed to the Attorney General of the State of Michigan at Lansing, Michigan and after placing proper postage thereon and sealing same he deposited said matter in a regular United States Postal box in the city of Kalamazoo, Michigan.

JAMES B. STANLEY,

Subscribed and sworn to before me this 18 day of May, 1943.

ELLA H. BARSTOW,
Notary Public, said county and state.

My Commission expires Aug. 2, 1946.

(6276)